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HIGH COURT OF MADHYA PRADESH,
BENCH AT GWALIOR

W.P. No.8104/2015

Dhanpal and another

Vs.

Mathura & Others.

Coram:

Hon. Shri Justice S.A.Dharmadhikari

Shri A.S.Bhadoriya, Advocate for the
petitioners.

Shri Ashok Rathore, Advocate for respondent
nos. 1 and 2.

ORDER

10/10/2017

In this petition, under Article 227 of the Constitution of India, petitioner has assailed the order dated 19/10/2015 (Annexure P/1) in Civil Suit No.9A/15 passed by I Civil Judge Class I, Sheopur, whereby petitioners/plaintiffs' application under Order 14 Rule 2, CPC has been rejected.

2. Brief facts leading to filing of this case are that petitioners filed a suit for declaration of title and permanent injunction and also for declaring the mutation/partition proceedings illegal/ineffective. The suit was filed on the premise that the disputed land and house, as mentioned in paragraph 1 of the plaint were originally ancestral in nature and belonged to late Peeriyar. Plaintiffs and defendants are his legal heirs. During the lifetime of Peeriyar, he had partitioned the property as mentioned in paragraph 4 of the

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plaint. It is also pleaded that since then plaintiffs have been in possession of the property as per the aforesaid partition. On notice, defendant/Respondent no.1 appeared and filed written statement denying plaintiff allegations. It was contended therein that there had been no partition as alleged by the plaintiffs. Subsequently, defendant no.1 again filed written statement along with defendant no.2 and also filed a counter claim praying that decree of declaration and injunction may be passed against the petitioners/plaintiffs. Petitioners filed reply to the counter-claim denying the averments made therein and prayed for its dismissal. On the basis of the averments made in the counter-claim, defendants moved an application under Order 39 Rules 1 and 2, CPC for restraining the plaintiffs from interfering with their possession. The said application was allowed . Aggrieved thereby, petitioners/plaintiffs preferred an appeal before the appellate Court. Meanwhile, the trial Court had framed issues. However, since the issues were insufficient, therefore, plaintiffs moved an application under Order 14 Rule 5, CPC for framing certain additional issues. Learned trial Court framed additional issue nos. 8 and 9. However, while dismissing the appeal, the learned first appellate Court had observed that the issue with regard to maintainability of counter-claim should be decided by the trial Court as preliminary issue. Accordingly, the petitioners/plaintiffs moved an application under Order 14 Rule 2, CPC praying that issue no.9 relating to maintainability of counter-claim be decided as a preliminary issue. However, the trial Court has dismissed the said application vide impugned order dated 19/10/05. Being aggrieved thereby, the present petition has been filed.

3. Learned counsel for the petitioners submits that on

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perusal of counter-claim, it can be seen that defendant nos. 1 and 2 stand on the same footing, therefore, the counter-claim on the basis of cause of action dated 14/1/2003, as alleged, is barred under the provisions of Order 8 Rule 6(a), CPC. It is also contended that issue no.9 relates to maintainability of the counter-claim, therefore, it is liable to be decided as a preliminary issue. The trial Court totally skipped this consideration and arbitrarily held that the said issue cannot be decided as a preliminary issue. That apart, the learned trial Court also erred in not considering the direction given by the appellate Court that the said issue is to be decided as a preliminary issue.

4. On the other hand, learned counsel for the respondents/defendants opposed the prayer made by the petitioners/plaintiffs and submitted that the observations made by the learned appellate Court are directory and not mandatory in nature. He further submitted that the issue as regards maintainability of the counter-claim is based on the question of limitation and, therefore, it is a mixed question of law and fact and cannot be decided as a preliminary issue. To bolster his submissions, he has placed reliance on decision of this Court in the case of *Vindhya Telelinks Ltd. Vs. State Bank of India* (1995 MPLJ 575).

5. The law laid down with regard to question of law and fact that it should be tried as preliminary issue has been settled by the Full Bench of this Court in the case of **M/s Ramdayal Umraomal Vs. M/s Pannalal Jagannathji (AIR 1979 MP 153 (FB))**. The Bench of this Court has observed as under:-

“Therefore, after reviewing the entire case-law on the point, we are of opinion that under Order 14 Rule 2 C.

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P. Code, an issue relating to jurisdiction of the Court can be tried as a preliminary issue only if it can be disposed of without recording any evidence. If the issue about jurisdiction is a mixed question of law and fact requiring recording of evidence, the same cannot be tried as a preliminary issue. Consequently the decisions cited as authorities on behalf of the applicant cannot be accepted as laying down the correct law. In fact the Division Bench Order dated 25-8-1977 reported in Ramdayal Umraomal v. Pannalal Jagannathji (1977 MP LJ 752 : AIR 1978 Madh Pra 16) has not at all answered the reference in clear words either this way or that way, creating confusion, and we are unable to agree with the view expressed therein and conclusion reached therein, if any, as that decision also has not decided the case correctly.”

6. On the basis of aforesaid reasoning it can be held that if the issue can be decided without recording the evidence, then it can be tried as preliminary issue. In the present case, question of limitation is involved for deciding the issue as to maintainability of counter-claim, which indisputably is a mixed question of fact and law and, therefore, it cannot be decided as a preliminary issue. The trial court has rightly come to the said conclusion, as in view of law laid down by the Full Bench of this Court in **M/s Ramdayal Umraomal (Supra)**, only those issues can be decided as preliminary issues, where the same can be decided without recording the evidence. In the result no fault can be found with the findings recorded by the trial Court.

7. As such, no ground is made out warranting interference under Article 227 of the Constitution of India.

The petition fails and is, accordingly, dismissed.

Consequently, the interim stay granted by this Court vide order dated 2/12/15 stands vacated.

(S.A.Dharmadhikari)
Judge

(and)